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Supreme Court, U.S.
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No. 91-1327

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

JAMES D. HOLDINESS, Petitioner,

v.

CSX TRANSPORTATION, INC., Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

James D. Holdiness ("Holdiness" or "Petitioner") was the Appellant in the proceeding below before the United States Court of Appeals for the Fourth Circuit whose per curiam opinion affirmed the judgment of the United States District Court granting summary judgment in favor of CSX Transportation, Inc.

CSX Transportation, Inc., ("CSXT" or "Respondent") was the Appellee in the proceeding before the United States Court of Appeals for the Fourth Circuit. CSXT is a wholly owned subsidiary of the publicly held entity known as CSX Corporation. There are no other publicly held entities that have a direct financial interest in the outcome of this case.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, CSX Transportation, Inc., respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against Petitioner James D. Holdiness.

STATEMENT OF THE CASE

Petitioner Holdiness at all relevant times was a special agent for CSXT, essentially functioning as a railroad security guard. He had been so employed for seventeen years at the time of the first occurrence cited in his Complaint.

Holdiness carried protective equipment and gear while on the job including a three fifty-seven Magnum Colt revolver, Kel-light stainless steel flashlight, Big Ben lantern, hard hat, wire twister, bolt bender, and a walkie-talkie with which to radio for help should he need assistance in performing any tasks.

Holdiness' job was to patrol the yard. In addition to closing car doors discovered open, Holdiness was to check the contents of the car and report and search for any missing property and possible suspects in connection with the property missing. Should he discover a car door that was difficult to close, Holdiness' instructions were to radio for assistance. Pulljacks were available for his use in closing car doors.

In 1990, Holdiness filed a Complaint in the United States District Court claiming damages from his employer, CSXT, as a result of three alleged on the job incidents, all occurring in 1987.

At the time of the first incident, Holdiness was patrolling at the A&P siding and yard in Halethorpe, Maryland when he discovered an open door of a boxcar. After examining the door and finding no defects or any missing property, he attempted to close the heavy door and felt a pain in his back. Holdiness chose not to request any assistance or a pulljack, both of which would have helped him close the door. Earlier the same day, another CSXT guard had inspected an open door on the same boxcar and after finding no defects, closed it with the human assistance which he had requested.

The second incident about which Holdiness complains occurred when he was patrolling the Baltimore, Maryland

Locust Point Railyard during early morning hours and was struck with a piece of wood by two unidentified assailants who appeared from an unknown location. There is no evidence proving the source of the wood even though Holdiness claimed that it resembled the kind of wood which lay around the railyard. Likewise, there was no evidence that additional lighting on the premises would have prevented the incident in that the location of the hidden assailants prior to the attack was never determined.

The final occurrence about which Holdiness complains took place when he responded to a radio call for assistance from another CSXT special agent while on duty at the Baltimore, Maryland Curtis Bay Railyard. Holdiness and the other special agent chased an unarmed suspected thief. While Holdiness was helping with the arrest, the suspect struck him one time. Holdiness was successful in subduing and handcuffing the suspect after striking him once with his flashlight. The evidence showed, by virtue of the incident itself as well as testimony of another special agent, that the flashlight is appropriately used as a nightstick or baton. Holdiness chose not to use his revolver to subdue the suspect. There was no evidence that would prove that additional security personnel or equipment could have prevented the single blow received by Holdiness at the hands of the assailant.

Based upon the record proof cited above as to which there was no genuine dispute of material fact and the fact that CSXT was entitled to judgment as a matter of law, the United States District Court granted the motion for summary judgment by CSXT as to the entire Complaint brought against it by Holdiness. The United States Court of Appeals for the Fourth Circuit affirmed that decision by per curiam opinion.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Holdiness filed his Petition for Writ of Certiorari in this Court seeking yet another opportunity to argue his Federal Employers' Liability Act ("FELA") cause of action and claim for damages against CSXT. Every court examining it has found that Holdiness has no sustainable claim. The United States District Court for the District of Maryland granted summary judgment in favor of CSXT as to the entire complaint because there was no issue of material fact and because CSXT was clearly entitled to judgment as a matter of law under the standards enunciated by this Court in *Celotex v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *See* Rule 56 of the Federal Rules of Civil Procedure. Summary judgment was entered for CSXT because the proof adduced would not justify a reasonable factfinder in finding for Holdiness absent speculation or guesswork. The United States Court of Appeals for the Fourth Circuit affirmed the grant of summary judgment in favor of CSXT by unanimous per curiam opinion. Because there is no proper ground for granting the Petition for Writ of Certiorari, it should be denied.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS THAT WOULD JUSTIFY THIS COURT IN EXERCISING ITS JUDICIAL DISCRETION BY REVIEWING THIS MATTER ON WRIT OF CERTIORARI.

The law is clear that review on a writ of certiorari is not a matter of right, but rather of judicial discretion. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10. A limited number of situations where a petition for writ of certiorari might be granted are described in the Supreme Court Rules, all of which are bound by the special and important reasons requirement. Those situations essentially involve cir-

cumstances in which lower courts have rendered conflicting decisions on important matters. In an effort to portray this scenario, Holdiness claims that his petition for writ of certiorari should be granted because the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against him conflicts with prior decisions of this Court. Quite to the contrary, none of the decisions cited in purported support of the petition could reasonably be characterized as conflicting with the opinion in Holdiness' case.

Review by this Court is discretionary, even where the correctness of the decision below is justifiably challenged. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"). For the petition for writ of certiorari to be granted, the case must involve principles important to the public and not just the parties.

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties ...."

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). *See also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) ("[T]his Court does not sit to satisfy a scholarly interest ... Nor does it sit for the benefit of the particular litigants")

Certiorari is improvidently granted where the petitioner seeks to have this Court disturb findings of fact established below, especially where as here, the factual findings have been concurred in by two lower courts, the Circuit Court of Appeals and the United States District Court. *See: Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower

courts"); *Branti v. Finkel*, 445 U.S. 507, 511 (1980) ("In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous"); *Rudolph v. United States*, 370 U.S. 269 (1962) (This Court dismissed a writ of certiorari improvidently granted because the findings of fact concurred in by two courts below resolved the determinative factual issues against the petitioner); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967) (This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); and *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

II. THERE IS NO BASIS ON WHICH TO FIND THAT THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS OF WHICH HOLDINESS SEEKS REVIEW IS IN CONFLICT WITH OPINIONS OF THIS COURT.

Although Petitioner claims a conflict between prior holdings of this Court and the decision in his case by the Fourth Circuit Court of Appeals affirming the grant of summary judgment against him, the Petition for Writ of Certiorari is in fact an attempt to have this Court disturb the factual findings below.

As to each of the three occurrences for which Holdiness sought damages from CSXT in his Complaint, the United States District Court found that there was no evidence of negligence by CSXT under the Federal Employers' Liability Act necessary to sustain a claim. *See* Memorandum Opinion, February 7, 1991, granting CSXT's motion for summary judgment (Joint Appendix 203-208). The opinion of the United States District Court reemphasized the fact that the FELA is not equivalent to

a no-fault workers' compensation scheme, but remains a fault-based system whereby a railroad employee must prove that negligence by the railroad actually caused or contributed to his injury.

As to the first cited occurrence wherein Holdiness claims he sustained back pain while closing a boxcar door, the District Court found that the evidence produced did not show any defect in the door, nor was there any evidence proving that the alleged injury occurred for any reason other than the fact that Holdiness chose to close the door himself without the use of an available tool or assistance from another employee.

Holdiness also complains of an alleged injury sustained when he was hit with a piece of wood by an unknown assailant. The District Court found there was no evidence from the facts produced during discovery that the condition of the railroad yard was inadequate for the simple reason that "railroad yards could not be kept free of potential weapons even under the utmost exercise of care". Likewise, there was no evidence that the alleged deficiency in the lighting of the yard had any causal relation whatsoever to the attack, nor was there any evidence upon which a reasonable jury could find that CSXT was responsible for the incident by virtue of not providing guards to protect other guards.

Finally, as to the third incident for which Holdiness seeks damages, the District Court determined correctly that CSXT could not be found liable under the FELA because Holdiness was struck once by an arrestee, whom Holdiness and another guard were attempting to apprehend. There was simply no material question of fact as to the adequacy of the tools available to Holdiness to do his job. The evidence showed that Holdiness chose not to use his revolver in subduing the suspect, and was in fact able to successfully apprehend the suspect by the use of his flashlight, regardless of whether he carried a tool specifically called a nightstick. These factual findings, when taken together,

evidenced no negligence by CSXT causing injury to Holdiness so as to justify recovery under the FELA. As such, the United States District Court granted the motion for summary judgment by CSXT. The Circuit Court of Appeals for the Fourth Circuit affirmed.

Despite these clear findings of fact mandating summary judgment, which findings were undisturbed on appeal, Holdiness attempts to reargue them to this Court. Absent a "real and embarrassing conflict of opinion and authority", however, certiorari is unwarranted. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). What Holdiness portrays as a conflict of opinion is, in fact, his dissatisfaction with the factual findings of the lower courts as to which he has no reasonable ground for challenge. Where this Court has found upon an examination of the record that the challenged decision of the Circuit Court of Appeals was not truly in conflict with the decisions cited by petitioner, the writ of certiorari has been dismissed as improvidently granted. *See*: *Sanchez v. Gautier*, 283 U.S. 798 (1931); and *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924).

The alleged basis of the Petition for Writ of Certiorari is a distilled version of the same factual arguments rejected by the United States District Court and the Fourth Circuit Court of Appeals, per curiam. None of the cases cited in the petition conflict with the decision of the Fourth Circuit herein.

All of the cases Petitioner cites show evidence of negligent conduct by the railroad as well as a causal connection between that conduct and the injury alleged. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), is an action under the FELA for damages claimed by a railroad laborer injured when burning weeds as the result of a slip and fall which occurred when he was retreating from flames fanned by the passing train. The Missouri Supreme Court had reversed a jury verdict awarding damages to the employee, basing the decision upon the premise

that the railroad should not be liable where the employee's conduct was at least as probable a cause for the mishap as any negligence of the railroad. This Court found that to be the wrong standard, further finding that the record below showed ample evidence of causal negligence by the railroad including the fact that the burning of weeds was normally done by flame throwers from cars on the tracks as opposed to by workmen on foot, coupled with the fact that common experience teaches that a passing train will fan the flames of a fire.

Webb v. Illinois Central Railroad Co., 352 U.S. 512 (1957), is likewise a case in which there was clear evidence of negligent conduct by the railroad causing injury. The railroad employee in *Webb* was injured due to a fall when he stepped on a clinker in the railroad's roadbed. There was evidence that the area in question had been elevated some three weeks prior to the accident and yet contrary to the railroad's custom and practice, the ballast had not been screened or inspected for the purpose of preventing just such clinkers as caused the injury at issue.

Similarly, in *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600 (1945), this Court found clear evidence of negligent conduct by the railroad, causally connected to the injury alleged. As in *Webb*, the proofs showed the accident complained of occurred because of a deviation from custom and practice. The plaintiff in *Blair* was injured when unloading greased pipes which were thirty feet long and weighed one thousand pounds. Because it was not customary for the railroad to unload pipes of this type at its warehouse, the equipment available for the task was a truck of an insufficient size to properly and safely carry out the job. Furthermore, the injured employee had informed his supervisor prior to attempting the task that it could not be accomplished without additional help.

Tiller v. Atlantic Coastline R. Co., 318 U.S. 54 (1943), cited by Holdiness in support of the general proposition that a railroad must provide a reasonably safe place in which to work,

is clearly inapposite. That opinion is premised entirely upon the ruling of the appellate court that the employee had assumed the risk of his injury. This Court held that a finding for the railroad based on assumption of risk was necessarily wrong by virtue of the clear language of the 1939 amendment to the FELA.

Sinkler v. Missouri Pacific Railroad Co., 356 U.S. 326 (1958), which Holdiness cites on the purported issue of notice of defect, in fact is an opinion based upon the issue of when third party negligence is properly attributable to the railroad on an agency theory. The evidence proved that the third party switching crew negligently caused the car on which the employee complainant was riding to collide with another railroad car, resulting in his injury. Because the switching crew was an agent of the railroad, in that the railroad owned one half of the stock of the agent corporation and designated half of its directors, the railroad was liable for the negligent conduct.

Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29 (1944), is likewise a case in which the petitioner railroad employee was required to present probative facts from which the negligence of the railroad and its causal relation to the alleged injury could be proven. It was specifically noted that only "*[i]f* that requirement is met ... the issues may properly be presented to the jury." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. at 33. *Tennant* was a claim for the wrongful death of a railroad employee of a switching crew killed on the job in a nighttime accident. Proof of the railroad's negligence was in evidence that an engineer had caused the train to move without sounding the customary warning bell.

Holdiness cites *Lillie v. Thompson*, 332 U.S. 459 (1947), to contend that CSXT was responsible for the criminal act of an unknown assailant. In contrast to the facts herein, the complainant in *Lillie* was a twenty-two year old telegraph operator required to work alone between the hours of 11:30 p.m. and 7:30 a.m. in a building in an isolated part of the railroad yard. As part

of her job she was forced to admit railroad workers who knocked demanding entry, but was unable to ascertain their identity because there were no windows by which to see out. The complainant in *Lillie* was attacked by an assailant, not a railroad employee, with a large piece of iron, who entered the door when she opened it in response to a knock. Unlike Holdiness, Lillie herself was not employed by the railroad to guard against the very danger about which she complained.

Finally, Holdiness cites *McGivern v. Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir. 1942), which provides no support whatsoever for the petition. The suit in *McGivern* was brought to recover damages for the death of a railroad switchman killed as the result of a fall from a footboard covered with ice and snow. The complainant contended that the railroad was negligent by failing to provide a safe place in which to work by allowing ridges of ice to accumulate on the footboards, failing to furnish the proper equipment and material to remove the snow and ice, and failing to adopt any rule or custom and practice requiring the removal of such snow and ice. In finding no substantial evidence proving negligence by the railroad causing the injury complained of, the Court reemphasized the rule that a right of recovery under the FELA must be predicated upon negligence. Because the negligence causing the injury was that of the employee alone, there could be no rightful recovery against the railroad.

None of these holdings conflict with the decision of the Fourth Circuit Court of Appeals affirming the grant of summary judgment against Holdiness. For this reason, and because there are no special and important reasons that would justify this Court in exercising its judicial discretion by reviewing this matter on writ of certiorari, the Petition For Writ Of Certiorari should be denied.

CONCLUSION

For all of these reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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